

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE**

R & J CONSTRUCTION

and

Case No. 2-CA-39287

ALBERTO BONILLA, An Individual

***Burt Pearlstone, Esq., for the General Counsel
Peter M. Rubin, Esq, (Rubin Cooper & Bertrand),
of Rockville Centre, New York, and
Richard B. Ziskin, Esq, (The Ziskin Law Firm, LLP),
of Commack, New York for the Respondent¹***

ELEANOR MACDONALD, Administrative Law Judge: This case was tried in New York, New York, on four days between March 17 and April 26, 2010. The Complaint alleges that Respondent, in violation of Section 8(a)(1) and (3) of the Act, subjected shop steward Alberto Bonilla to closer supervision and discharged Bonilla because he engaged in activities on behalf of the New York City District Council of Carpenters. At the hearing the Complaint was amended to allege that

In and around March and April, 2010 [the Employer] on at least two occasions, questioned employees in preparation for the instant unfair labor practice proceeding without administering all three *Johnny's Poultry* warnings....

In and around April 2010, [the Employer] interfered with, restrained, and coerced its employees in the rights guaranteed them in Section 7 of the Act by asking employees to obtain copies of their affidavits given to the NLRB, without giving them the requisite assurances that their participation was purely voluntary, and that no reprisals would be taken against them.

Respondent denies that it has engaged in any violations of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent on June 30, 2010, I make the following

Findings of Fact

I. Jurisdiction

Respondent R & J Construction, a domestic corporation with an office at 4435 Austin Boulevard., Island Park, New York, is engaged in the business of serving as a carpentry, drywall

¹ Richard B. Ziskin, Esq., filed a notice of appearance after the close of the hearing.

and finishing contractor. Respondent annually purchases and receives goods and supplies valued in excess of \$50,000 at its New York facilities directly from suppliers located outside the State of New York. Respondent annually derives gross revenues in excess of \$500,000. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act and that New York City District Council of Carpenters is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background

Respondent, a company established about 26 years ago, primarily performs drywall and finish carpentry work on a variety of building sites. At any time the company has between 350 and 400 employees working on various jobs. Respondent admits that the following individuals hold the positions set forth opposite their respective names and are supervisors of Respondent within the meaning of Section 2(11) of the Act and/or agents acting on its behalf:

Ralph Richardson	President/majority shareholder
Scott Horak	Vice-President/co-owner
Kevin Sebade	Superintendent/Foreman

The events at issue herein took place at a building site located at 400 West 12th Street in New York City. The 16 story building is described as a “high-end condo” with 7 attached brownstones. Respondent began work at the site in early 2008 and its work was nearly complete at the time of the instant hearing in spring 2010. At the height of Respondent’s work on the building it had from 25 to 35 carpenters at the site. The work was a union job subject to the 2006-2011 collective-bargaining agreement between the Association of Wall-Ceiling & Carpentry Industries of New York, Inc., and the District Council of New York City and Vicinity of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO. Carpenters employed by Respondent were members of various locals in the District Council.² Pursuant to the collective-bargaining agreement, 50% of the carpenters, known as company men, were recruited directly by Respondent and 50% were referred by the Union from its out-of-work list.

Plaza was the General Contractor at the site and ultimately responsible for the success of the project. Other trades present at the building site when Respondent was working there included electricians, plumbers, tapers, painters and laborers.

Respondent maintained a shanty on one of the lower floors of the job site. Gang boxes containing the carpenters’ tools were located throughout the building. Carpenters were expected to report to the shanty every morning to signal their attendance to the employer and to receive their assignments. There is a controversy, which I need not resolve, about the morning reporting time and procedures. It is not disputed that the work hours at the job were 7 am to 2:30 pm with ½ hour off for lunch. Respondent’s witnesses maintained that carpenters had to report to the shanty before 7 am in order to check in with the foreman, receive their assignments and proceed to the floor for work. Respondent’s witnesses said that the men had to be at their assigned locations or at their gang boxes at 7 am. The General Counsel’s witnesses maintained that the lift did not begin to operate until 7 am and that it was thus not possible for the carpenters to be at their gang boxes or at their assigned locations exactly at 7 am. Further,

² All of Respondent’s employees, including the foremen, are union members.

the evidence shows that not all carpenters reported to the shanty every morning to check in with the foreman; some men went directly to their work locations and informed the foreman of their presence later in the day.

5 Kevin Sebade was the general foreman of the West 12th Street job. He has been employed by Respondent for about 25 years and has been a foreman on 15 or more prior job sites for the company. At the West 12th Street site his duties were to oversee the entire project, assign the work, monitor the carpenters, order materials, and maintain quality control.

10 Fred Sebade, Kevin Sebade's brother, works for Respondent as a carpenter and he functions as Kevin Sebade's assistant. About 95% of his employment over the last 20 years has been with Respondent.

15 Pursuant to the collective-bargaining agreement Respondent was required to employ one carpenter as a shop steward designated by the Union. If a shop steward left the job for any reason Respondent had to request his replacement from the Union. Charging Party Alberto Bonilla was the 5th shop steward employed by Respondent at the West 12th Street building. He began work on December 16, 2008 and was discharged on April 15, 2009. The first shop
20 steward, Efraim Ragain, left for a reason not disclosed in the record. The second shop steward, Regis Phillips, was terminated by Respondent for alleged incompetence. Mark Sheehan, the third shop steward left for an unspecified reason. The fourth shop steward, Kevin McCabe, was removed by Respondent. McCabe's layoff was not alleged as an unfair labor
25 practice in the instant Complaint and I stated on the record that I would make no finding that his layoff was unlawful. However, evidence from McCabe's period of employment is admissible to show anti-union animus on the part of Respondent.

When requesting that the Union send a shop steward to the job, Respondent would specify that the individual should have certain skills appropriate to the work he was to perform.

30 **B. Duties of the Shop Steward**

Bonilla described his shop steward duties as making sure that all the carpenters on the job were Union members, ensuring that they were working in a safe environment, checking the accuracy of the time records so that all carpenters were paid according to the collective-
35 bargaining agreement, keeping watch in order to prevent any other trades performing carpenter's work and bringing the shop steward's report to the Union hall once a week. The weekly shop steward's report contains the names of all Union members who worked at the job site during the past week and records their Local Union number, their ID number, whether they were on the job as company men or Union-referred workers and the total daily and weekly
40 hours worked by each carpenter.

Bonilla testified that he came to work daily between 6:30 and 6:45 am and reported to the shanty. Before 7 am he met with foreman Kevin Sebade in the shanty to go over the names of employees who were working that day. In theory, all carpenters would appear in the shanty
45 before work to receive their assignments and would be recognized by the foreman and the shop steward. However, Bonilla's un rebutted testimony established that some carpenters did not report to the shanty but went straight to the site where they were to work for the day. Some carpenters might have reported in before Bonilla got to the shanty on a particular day and he would have to rely on Kevin Sebade to tell him that those employees were actually working.
50 Kevin Sebade testified that he usually told Bonilla the names of all new carpenters on the job, but he acknowledged that he may not have always done so.

The collective-bargaining agreement provides in Article VI, section 2:

5 ... All New York City District Council certified Shop Stewards shall be given time to deliver his or her Shop Steward reports for that work week to the Union hall ... and the time must be agreed between the Employer and the Steward. When a signatory Employer wishes to layoff a Shop Steward during a continuous employment, the Employer must notify the Union and have a meeting on the job with the union within twenty-four (24) hours.

10 Bonilla testified that to fulfill his duties as shop steward he spent a certain amount of time "walking the job". According to Bonilla, on every job site the shop steward walks the job in the morning. This activity is carried out by going to each floor where people are working and checking to see who is performing particular tasks and under what conditions. At the West 12th Street site Bonilla walked the job to check on carpenters who had not reported to the shanty
15 when he was there. By walking the job Bonilla might find that there were carpenters whose names were not on the list checked by steward and the foreman that morning. Bonilla might observe safety violations that required immediate correction and he might discover other trades performing carpenter work. At the West 12th Street site, a 16 story building with 5 to 7 apartments per floor, Bonilla stated it took him about ½ hour each morning to walk the job.
20 Kevin Sebade also testified that it might take ½ hour for Bonilla to check the site to make sure that carpenters working at the building were members of the Union.

25 Bonilla testified, without contradiction, that on a few occasions when walking the job he had found carpenters on site who had not reported to him and as to whose existence he had not been alerted by foreman Sebade. Similarly, Bonilla testified that he had discovered an electrician doing carpenter work and he had seen a laborer carrying carpenter supplies in preparation for performing carpenter work.

30 Kevin McCabe, the shop steward employed immediately before Bonilla, testified that he arrived at the shanty between 6:30 and 6:45 am, said hello to the carpenters, asked for his job assignment and headed up to the floor to which he had been assigned. McCabe recalled that not all the men reported to the shanty; some went up to their work floor. McCabe stated that he walked the job once a day, but not every day of the week. He testified, without contradiction, that he had once discovered a carpenter who had been on the job for three days without the
35 shop steward or the Union being informed about his presence.

40 John Daly, the business agent for the NYC District Council who was responsible for the West 12th Street site, testified that the shop steward is his eyes and ears. The shop steward is supposed to walk the job to determine the number of carpenters working and to determine whether new carpenters have been hired. The shop steward checks to see that conditions are safe, he records the hours worked by carpenters and he makes sure that Union workers are on the job. According to Daly, there is an unwritten agreement that shop stewards are allowed some latitude to walk the job before performing the work to which the foreman has assigned them.

45 Foreman Kevin Sebade was called by Counsel for the General Counsel pursuant to Rule 611(c). In response to Counsel for the General Counsel's questions, Sebade testified that a shop steward is not permitted to do Union business during his shift aside from the one hour per week allotted for bringing the shop steward's report to the Union hall. Sebade insisted that the
50 shop steward is not allowed to walk the job because this activity is not provided for in the collective-bargaining agreement. Sebade was then confronted with his sworn statement provided to the NLRB during the investigation of the instant case. Sebade's statement reads,

“[A]s a Union shop steward, Bonilla is permitted to perform certain Union business during his shift, including recording the hours of each of the bargaining unit employees, and walking the job.” Despite having his attention called to this prior statement, Kevin Sebade denied that it is the custom and practice for shop stewards to walk the job and he stated if shop stewards walked the job, “they wouldn’t be around very long.” However, when called later in the hearing by Counsel for Respondent and questioned about the tenure of shop steward Kevin McCabe, Sebade again changed his testimony and testified that he did not restrict McCabe from walking the job because shop stewards can occasionally walk the job.³

Respondent’s Vice President Scott Horak testified that as a courtesy the company lets the shop steward walk the job.

C. Alberto Bonilla’s Employment

1. Bonilla’s Carpenter Work

Alberto Bonilla began working for Respondent on December 16, 2008, the day after McCabe left the job. Foreman Kevin Sebade testified that when a replacement for McCabe was sought from the Union he specified that the new shop steward would be working on general metal framing of the inside walls. When the Union sent Bonilla to the job site, he had been a Union member for 23 years and a shop steward for 17 years. Bonilla had taken a course offered by the Union to become a “certified” shop steward.

Bonilla described his work as constructing metal partitions and doing metal ceiling framing. He also did “pick up work” which involved altering walls already in place so as to make necessary modifications and repairs. Kevin Sebade testified that everyone does pick up work but he also denied that Bonilla did any pick up work.

2. Bonilla’s Shop Steward Duties

Bonilla testified that every Friday morning he went to the Union Hall at 35th Street and 8th Avenue to hand in his shop steward’s report to business agent Daly. He left the work site at 7 am and returned to work between 8:30 and 9 am. At the Union hall Bonilla stood in the line of shop stewards waiting to see the business agents. According to Daly there were about 150 shop stewards in the line to see the 5 or 6 business agents on duty every Friday. Once he was admitted to the business agent’s office, Bonilla went over the shop steward’s report with Daly. Daly checked the Union membership of any new hires and he made sure that the 50/50 rule was being observed as to the proportion of carpenters on the job. Bonilla reported to Daly about events on the job and if there were any problems Daly called Respondent’s office.

Bonilla testified about a number of occasions when he disagreed with Kevin Sebade’s wishes at the 12th Street job. During the first month of his employment, Sebade asked Bonilla if the carpenters could work through lunch in exchange for early dismissal. Apparently some of the men would have agreed to this arrangement. The collective-bargaining agreement provides for a ½ hour lunch break and requires the payment of overtime if a carpenter works through lunch. Bonilla discussed the issue with Daly and then told Sebade that working through lunch in exchange for leaving early was not permitted by the contract. Daly stated that he had refused permission because the company was not offering to pay the men time and one half for working

³ Based on Kevin Sebade’s shifting and inconsistent testimony I find that he is not a credible or reliable witness and I shall make factual findings accordingly.

through lunch. Sebade confirmed that he had asked Bonilla if the carpenters could work through lunch.

During the first month of his employment, Bonilla heard Kevin Sebade tell the carpenters that if they were not in the shanty between 6:30 and 6:45 am they would be fired. Bonilla protested to Sebade, telling him that work began at 7 am; if carpenters were told to be at work prior to that time the company would owe them overtime pay. Bonilla pointed out that the lift did not begin operating until 7 am. Sebade's affidavit confirms that Bonilla maintained that if the men were required to start work early they should receive overtime pay. Sebade testified that he knew Bonilla did not want him to instruct the men to report at 6:30 am. Daly testified that Bonilla told him if the men were not in the shanty between 6:30 and 6:40 Sebade would warn them and scream that they were late for work. As a result of Bonilla's report about the start time controversy, Daly came to the job site in early January 2009. Daly met with Bonilla and Kevin Sebade in the shanty; he told Sebade that if he made the men begin work before 7 he would have to pay them overtime. Bonilla testified that during this meeting Daly asked Sebade if he had a problem with the shop steward; Sebade responded that he did not and said that Bonilla was a good worker and a good shop steward.

The collective-bargaining agreement provides that on New Year's Eve the carpenters may work only four hours but they shall be paid for a full day. According to Bonilla, Sebade told the men to stay home on New Year's Eve, thus enabling the company to pay them only three hours' pay for the entire day. However, Bonilla came to work and was paid for the full day.

Bonilla was involved in overtime controversies with Kevin Sebade. Around March 16, 2009 Bonilla received complaints that 9 carpenters had worked overtime but were not paid time and one-half as provided in the contract. Some of the men had worked an extra hour on one day and some had worked an extra half hour on another day. When Bonilla told Kevin Sebade that the men should be paid overtime, Sebade replied that it was only 15 minutes. Bonilla informed Daly of the problem and Daly filed a grievance under the collective-bargaining agreement. Later in March a member of another trade told Bonilla that 3 carpenters had worked overtime and asked why Bonilla had not been present. The steward is entitled to work overtime if any carpenters are doing so. Bonilla reported the omission to Daly and as a result he was paid 2 ½ hours overtime.

In late March or early April Bonilla was walking around the site looking for some material he needed to complete an assigned task when he saw a carpenter working on a 6 foot high scaffold without a railing. This was contrary to OSHA regulations and Bonilla told the man he was working in an unsafe manner and that he needed a railing. Fred Sebade was present and Bonilla requested a railing for the scaffold but Fred Sebade disagreed. Bonilla called the company's safety inspector to report the condition. Kevin Sebade confirmed that Bonilla had complained to him about the unsafe condition on the scaffold.

Bonilla testified that Kevin Sebade told him to stop walking the job after the incidents resulting in the overtime and safety complaints. Sebade told him that previous stewards had been laid off because they walked the job. Sebade said the company did not want him to walk the job and if he kept it up he would be fired in the same manner as the other shop stewards. Kevin Sebade did not deny that this conversation took place.

One Friday when Bonilla was returning to the job site after handing in his steward's report he met an apprentice who had been sent home due to an argument with a foreman. Bonilla telephoned Daly who instructed him to bring the apprentice back to the job. As Bonilla approached the job he met Kevin Sebade who began screaming that the apprentice should

leave and threatened to have the guards remove the apprentice. Bonilla spoke to an official of the general contractor and explained that the business agent wanted the apprentice returned to the job so he could be paid for the day. As a result, the apprentice was permitted to complete his day's work.

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Daly testified that Bonilla informed him that Kevin Sebade was a hard man to work with. Bonilla stood up to him about the early starting time and working through lunch and Sebade was not happy because he was not getting his way.

10 **3. Respondent's First Request to Remove Bonilla**

Kevin Sebade testified that Bonilla's work performance was satisfactory until mid-February 2009. Sebade said the company gives shop stewards a little latitude in their productivity. However, Sebade testified, beginning in mid-February when he was making his
15 daily 3 or 4 rounds of the building he noticed that Bonilla was not at his job. Sebade testified that when he failed to find Bonilla he would turn off the drop light that illuminated the room where Bonilla was working. Bonilla asked Sebade why he did that and, according to Sebade, Bonilla then explained where he had been and what he had been doing.

20 Sebade testified that he began checking Bonilla's whereabouts more often in March 2009 because he noticed that Bonilla was not at his work location. In fact, Bonilla was not at his job close to one half the time that Sebade checked on him.

25 Sebade also testified that Bonilla took 2 ½ to 3 hours to travel to the Union hall with his weekly shop steward's report. Respondent's President Richardson testified that Sebade called him in March and said he could not find Bonilla at his assigned station. Horak also testified that Sebade called the office and said the shop steward was not working at all.

30 On March 13, 2009 Richardson sent the following letter to Union business agent John Daly:

We are requesting a meeting with the business agent at our job site located at 400 West 12th Street to discuss the lack of performance by the Shop Steward. Please confirm that you received this letter and what day is better for you, Tuesday March 17th or
35 Wednesday March 18th at 8:00 AM.

There is conflicting testimony about when the requested meeting took place. Business Agent Daly testified that March 17 is the anniversary of his father's death and every year he goes back to Ireland to commemorate the occasion. In 2009 Daly returned to Ireland around
40 March 14 and stayed about 8 days. He hurt his back on the return trip and was out of work for a time which he estimated at about 2 weeks. Daly testified that he attended a meeting concerning Respondent's desire to remove Bonilla; Daly thought the meeting took place in early April but it could have been at the end of March. Bonilla was not able to give a precise date for the meeting and he could not recall who was present. Richardson did not attend the meeting.
45 Kevin Sebade attended the meeting; he testified that the meeting took place on March 17th and not a few weeks later. Company Vice-President Scott Horak testified in response to a leading question by Counsel for Respondent that he attended the meeting and that it took place in late March 2009; he was sure it was not in April. Given the lack of specificity in the record, the best that can be said is that the meeting in response to the March 13 letter took place at the very end
50 of March or in very early April.

Daly testified that he spoke to Richardson in response to the March 13 letter after his

return from Ireland. Daly told Richardson that there had been many shop stewards on the job site. Daly said the problem was not with Bonilla's production; the problem was that the shop steward was doing his job.

Horak testified that Bonilla was discussed at the meeting held in response to the March 13 letter but he did not provide any particulars. However, it is clear that Horak told Daly Respondent wanted to remove Bonilla from the job. Kevin Sebade testified that Horak told Daly that the company was unhappy with Bonilla's performance because he was never at his job location. Daly testified that he responded to the company's request by remarking that they should know right away if a man was not producing. Daly said the real problem with Bonilla was that he did not agree to Sebade's request that the carpenters work though lunch. Daly asked the company to keep Bonilla on the job. Sebade stated that Daly was "relentless" in asking that the company give Bonilla a second chance. According to Sebade, Daly said he would talk to Bonilla and he would do better so Horak relented and Bonilla was kept on the job.

Bonilla testified that after the meeting he ran into Richardson who told him that the company would forget what happened and they would make a new start. Richardson placed this conversation in April. He stated that he told Bonilla they would forget about the past and start over and that the two then shook hands.

4. Argument Between Kevin Sebade and Bonilla

Bonilla testified that in March and April 2009 he noticed that Kevin Sebade was supervising him more closely than before. Sebade came to the room where Bonilla was working and repeatedly asked Bonilla what he was doing, where he was going and when he would finish his work. Sebade had not behaved this way previously. At this time Bonilla was doing modifications to work that had already been built and some material was not available on the floor where he was working. On about 6 occasions Bonilla had to look for studs, furring channels, clips and track on other floors. At various times, Bonilla was away from his location visiting a portable toilet.⁴ Sometimes Bonilla was walking the job and finding carpenters whose names were not on the time sheets he went over with Kevin Sebade in the shanty every morning or he was looking for other trades performing carpenter work. Bonilla was also entitled to a coffee break between 9 and 10 am. Bonilla testified that beginning in mid-March 2009 when Kevin Sebade came to his work location and found him absent, Sebade would turn off the drop light in his work space: this happened once or twice a day. Sebade told Bonilla that he turned out the light because Bonilla was not there.

Beginning in mid-March 2009, according to Bonilla, Kevin Sebade began to complain about his work. Before the March 13 letter had been sent his work had not been the object of any complaints and his drop light had not been turned off while he was away from his work location.

Bonilla testified that after the March 13 letter requesting his removal had been sent to the Union, he was put to work in the same apartment with a carpenter named Tom Harty. In the last week of his employment, an incident occurred as he was returning from a trip to the toilet. When Bonilla entered the room where he was working he saw that his drop light was off and that Kevin Sebade was waiting for him. Sebade said he had been waiting 20 minutes. Sebade began screaming at Bonilla and asking when Bonilla would finish his work. Bonilla replied,

⁴ According to Fred Sebade the portable toilets were located every four floors or every six floors in the building site.

"Enough with the harassment. I don't want to hear you no more. Just leave me alone." After Sebade said he would fire Bonilla the latter told him to do what he had to do but asked to be left alone. At this point Harty came from the room where he had been working and said to Bonilla, "You don't know who you're dealing with." Harty placed himself between Bonilla and Sebade.
 5 Kevin Sebade told Harty not to get involved and Harty walked away. Bonilla then mounted his ladder and resumed work. Fred Sebade was present during this exchange.

Harty, who has worked for Respondent on various jobs for the last 7 years and estimated that 2/3 of his employment was attributable to the company, testified that during the
 10 incident he saw Bonilla point his finger at Sebade. Harty had been working in a different room from Bonilla. He recalled that Kevin Sebade had come in looking for Bonilla and asked him how long Bonilla had been gone from the apartment. Harty does not wear a watch. He testified that because the walls of the apartment were up he could not see into the room where Bonilla was working while he was doing his own work. Harty acknowledged that a person working in one
 15 room might not know the whereabouts of a person working in another room. However, Harty told Sebade that Bonilla had been gone 15 to 20 minutes. Harty testified that Bonilla returned to the apartment 45 minutes later to find Sebade waiting for him. When questioned about the incident Kevin Sebade stated that he had waited 15 to 20 minutes for Bonilla on this occasion and that when he asked Bonilla where he had been the latter replied that it was none of his
 20 business. Sebade testified that, "There was screaming", and he thought Bonilla might swing at him if he did not walk away. Sebade reported the incident to Richardson.

Respondent offered no testimony that this incident was the cause, or a cause, of its desire to remove Bonilla from the job site.

25 **5. Respondent's Second Request to Remove Bonilla**

Kevin Sebade testified that after the meeting prompted by the March 13 letter he told his superiors that Bonilla's attitude was getting worse, not better. Sebade checked on Bonilla's
 30 whereabouts a little more often and he saw that Bonilla was absent from his assigned work place 50% of the time. Sebade testified that a carpenter should average one apartment per day, or more if the apartment had only one bedroom, but Bonilla did not meet this average. I note that Sebade did not specify what tasks a carpenter should complete in the apartment on average in one day and he did not contrast this average standard with the amount of work that
 35 Bonilla generally accomplished in one day.

Richardson testified that soon after he and Bonilla shook hands on the new start Sebade told him that Bonilla was doing the same things he had done in the past; he was not working at his station and he was walking around. Richardson said he would ask for a new shop steward
 40 and he sent a letter dated April 9, 2009 to business agent Daly:

We are requesting a meeting with the business agent at our job site located at 400 West 12th Street to discuss the lack of performance by the Shop Steward. Please call to
 45 confirm that you received this letter and to set up a meeting time that is convenient for you next week.

A second meeting was held on April 15, 2009, attended by Richardson, Kevin Sebade, Daly and Bonilla. Richardson said he did not want Bonilla on the job and that he wanted another shop steward. Daly replied that it was obvious where the problem lay. Bonilla said he
 50 was being removed because the company did not want him enforcing the collective-bargaining agreement. Daly again urged Richardson to keep Bonilla on the job; he suggested that the company send the foreman to supervise a different job. Daly said, "The problem was that

[Bonilla] was fulfilling his duties as a shop steward, and that's why ... R & J wanted to lay him off, meaning working through lunch, he objected to that. He objected to guys – that the screaming in the morning, starting before seven o'clock. And also, the deliveries, guys go home early. So probably, when Kevin wasn't getting his own way, he felt we have to lay him off.”

5 Richardson refused to consider Daly's suggestion to send the foreman to another job and he refused to keep Bonilla on the job.

Richardson testified that Bonilla was fired for not being at his job site and because he left his station too many times. I note that Richardson did not cite the incident with Kevin Sebade and Harty as a factor in seeking Bonilla's removal from the job. Nor did Richardson state that Bonilla was not capable of performing the work assigned to him. In fact, Kevin Sebade said that Bonilla was, “decent as a framer.” Sebade stated that Bonilla was discharged for “total lack of productivity.”

15 After he was terminated by Respondent, Bonilla told Daly that he was going to the NLRB. Bonilla did not ask the Union to file a grievance concerning his discharge.

D. Other Evidence of Alleged Anti-Union Animus

20 Kevin McCabe was the shop steward on the West 12th Street job site just prior to Bonilla's employment. McCabe was employed from October 15 to December 15, 2008. McCabe testified that during his first day on the site, Kevin Sebade asked him if the carpenters could work through lunch in return for permission to go home early. McCabe told Sebade that it would probably not be allowed and that he had to discuss it with Daly. McCabe could not reach

25 Daly immediately and Sebade continued to press the issue. Sebade told McCabe that the previous shop steward had not raised any objection. After McCabe spoke to Daly and informed Sebade that the men could not work through lunch, Sebade angrily said, “That's bullshit!” and remarked that Daly would never know if the men did in fact work through lunch. Kevin Sebade did not deny this exchange.

30 McCabe testified that Kevin Sebade told him to stay in his work area and said that he did not want to see McCabe walking the job. When McCabe replied that he would walk the job, Sebade said, “We'll see about that.” Sebade did not deny this conversation.

35 McCabe testified that Kevin Sebade yelled at him whenever Sebade saw McCabe speaking to the other carpenters. Sebade did not deny this assertion.

McCabe recalled the meeting held after Respondent expressed its desire to get him off the job. Horak and Kevin Sebade were present for the Respondent; Daly and two other business agents represented the Union. Horak told the Union representatives, “I'm not paying this fucking guy to walk this fucking job.” Daly responded that McCabe was doing his job and Horak replied, “I don't give a shit.” Horak did not deny this conversation. Horak testified about the meeting concerning McCabe. His testimony was given largely in response to leading questions by Counsel for Respondent: Horak could not recall when the meeting took place and I

45 formed the impression that he had very little recollection of what was actually said at the meeting. Horak seemed to testify that the Union agreed to McCabe's termination but in fact Horak could not recall anything that Daly said with respect to McCabe. Kevin Sebade testified that Horak told the Union the company paid its employees too much money and could not have somebody constantly wandering the job, looking for a non-issue.

50 McCabe had applied for a civil service job with the City of New York. At the time of the meeting between Respondent and the Union, McCabe was scheduled for an interview in

connection with his application. McCabe left the meeting early. Daly testified that he did not agree to McCabe's termination at this meeting. Daly believed that Respondent wanted to get rid of McCabe because he would not permit the men to work through lunch while waiving their right to overtime pay.⁵ At one point the company said that McCabe was not "producing". Daly
 5 replied that McCabe had been on the job for 5 or 6 weeks and they should have known sooner if he did not produce. Daly urged Respondent to keep McCabe on the job, saying that McCabe was going to leave anyway for a position with the City. Respondent agreed that McCabe could keep working. McCabe was concerned that Respondent would give him a bad reference and jeopardize his efforts to obtain the City job. After the meeting, Kevin Sebade told McCabe that
 10 the business agents had agreed he would stay in his work area. As a result, McCabe no longer walked the job. However, after two more weeks Sebade told McCabe that he had to go, but he agreed to report that McCabe had been laid off.

E. Alleged Johnny's Poultry Violations

15 Fred Sebade was called to testify by Respondent and he said he was appearing "voluntarily." Fred Sebade said that no one told him that if he refused to testify no reprisals would be taken against him. On cross-examination by Counsel for the General Counsel, Fred Sebade stated that foreman Kevin Sebade told him that he needed to testify: "There's a
 20 proceeding concerning the suit the shop steward's bringing. And, I – that I'll have to testify." When Fred Sebade met with Attorney Rubin prior to the hearing, Rubin told him, "The shop steward is suing us, and you have to testify."

25 Harty testified the company informed him that the instant hearing was going on and that Rubin would get in touch with him. Harty met with Rubin on two occasions before the instant hearing. Rubin asked Harty some questions and went over his testimony. Harty was told that he would be paid for his time while testifying. In response to a question from the ALJ Harty said that he was asked to go meet Rubin so he went. Harty testified he received no assurances that he if did not want to meet with Rubin or if he chose not to answer Rubin's questions he would
 30 suffer no consequences on the job.

Harty testified that Kevin Sebade asked him to provide his affidavit to Rubin. The reason given was that Harty had to testify in the instant proceeding.

III. Discussion and Conclusions

A. Discharge of Bonilla

40 The allegation that Bonilla's discharge constituted a violation of Section 8(a)(3) of the Act must be analyzed pursuant to the method set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

45 It is undisputed that the shop steward was required to submit his weekly report at the Union hall every Friday morning and that he was entitled to absent himself from the job site for the time it took to accomplish this task. In addition, I find that the shop steward was permitted to walk the job every day in order to identify all the carpenters on the job, to make sure the carpenters were Union members who were being paid according to the collective-bargaining agreement, to make sure no other trades were doing carpenter work and to check on the safety

50 ⁵ Daly explained that the general contractor would not pay extra to Respondent if the men worked overtime unless the general contractor itself had requested the overtime.

of the job site. I credit the testimony of Bonilla, Daly and McCabe on this issue. I do not credit Kevin Sebade's testimony that the shop steward is not permitted to walk the job. This testimony is contrary to Sebade's affidavit given to a Board agent prior to the instant hearing and it is contrary to Horak's testimony that the shop steward is permitted to walk the job. In fact, at
 5 some points in his testimony, Kevin Sebade did acknowledge that the shop steward is permitted to walk the job.

The record shows that when a shop steward walks the job he finds carpenters who are not on the daily and weekly report and who may therefore not be paid the required wages and benefits. Shop stewards who walk the job find safety violations and identify work belonging
 10 to carpenters but being performed by other trades.

I find that Kevin Sebade's denial that the shop steward could walk the job is an indication of his objection to this practice by Respondent's shop stewards. Sebade clearly did not want the shop stewards to take time from their work to fulfill this basic duty of the shop steward. Sebade himself testified that if shop stewards walk the job "they wouldn't be around very long." I credit McCabe's testimony, which was not denied, that Kevin Sebade told him to stay in his work area and refrain from walking the job.⁶ I credit McCabe that when he insisted that he would walk the job, Kevin Sebade replied, "We'll see about that." Indeed, the evidence shows
 15 20 that it is Respondent's policy to prevent the shop stewards from walking the job. I credit McCabe that Horak told Daly that he was not "paying this fucking guy to walk this fucking job." I credit McCabe that when Daly told Horak that walking the job was the shop steward's job, Horak replied, "I don't give a shit." Horak did not deny these remarks.

I credit Bonilla and McCabe that they objected when Kevin Sebade asked the men to work through lunch without paying overtime as required by the contract. I credit McCabe that Kevin Sebade replied "That's bullshit" when McCabe refused to agree to his request about working through lunch. I credit Bonilla that after he made complaints to Kevin Sebade about overtime pay violations and a safety violation, Sebade directed him to stop walking the job.
 25 30 Sebade told Bonilla that previous stewards had been fired for walking the job and he warned Bonilla that if he kept walking the job he too would be fired. Kevin Sebade did not deny this conversation.

Kevin Sebade and Horak expressed their hostility to shop stewards who engaged in the Union activity of walking the job and who insisted on following the terms of the collective-bargaining agreement. This hostility is a clear indication of Respondent's anti Union animus.
 35

Kevin Sebade told Bonilla to stop walking the job or he would be fired in the same manner as other shop stewards who walked the job. Kevin Sebade testified herein that shop stewards who walk the job would not be around very long. Horak used an obscene expression to state Respondent's policy against paying shop stewards who walk the job. Bonilla continued to perform his shop steward activities despite Sebade's warnings that he should cease doing so. I find that the General Counsel has met his burden under *Wright Line* to show that Bonilla's Union activities were a motivating factor in Respondent's decision to remove Bonilla from the job site.
 40 45

I do not credit Kevin Sebade that Bonilla was absent from his job location for excessive

⁶ McCabe was a credible witness and I shall rely on his testimony. At the time of the instant hearing McCabe held a civil service position with the City of New York. McCabe had no motive to shade his testimony to favor either party in this proceeding.
 50

amounts of time and that Bonilla's productivity was therefore substandard. Instead, I find that Sebade's testimony was a fabrication to justify Respondent's objection to Bonilla's shop steward activities. As discussed above, although Sebade said an average day's work for a carpenter was one apartment per day, or more if the apartment had only one bedroom, he offered no details as to how much work Bonilla actually accomplished in a day. If Bonilla was in fact unproductive Sebade should have been able to compare the work done by Bonilla with the standard he enunciated. I find that Sebade's testimony was vague and unpersuasive. Further, I have found that he was generally not a credible and reliable witness. Richardson based his decision to remove Bonilla from the job on Kevin Sebade's report. I find that Respondent's contention that it discharged Bonilla for lack of productivity is a pretext. Respondent has offered no other motive for the discharge and has not shown that it would have discharged Bonilla even if he had not performed his shop steward duties.

Respondent violated Section 8(a)(1) and (3) of the Act by discharging Bonilla for his Union activities.

B. Closer Supervision of Bonilla

Kevin Sebade admitted that he began checking on Bonilla's whereabouts and his work more frequently beginning in sometime in March 2009. By this time Bonilla had clashed with Kevin Sebade about Sebade's demand that the carpenters report to work early and his request that carpenters work through lunch. Both of these requests implicated the payment of overtime, an expense which Respondent did not wish to incur. Around mid-March Bonilla learned that carpenters had worked overtime without pay and Daly filed a grievance concerning this issue. Also in late March or early April, Bonilla raised a safety concern with Sebade. After these incidents Kevin Sebade instructed Bonilla to cease walking the job and threatened to fire him if he continued.

Kevin Sebade's efforts to prevent Bonilla from walking the job coincided with his admitted closer supervision of Bonilla. Sebade's own testimony establishes his determination that stewards who walk the job will not remain in Respondent's employ. The increased supervision was a result of Bonilla's activities on behalf of the Union; Sebade's closer supervision of Bonilla constituted an unlawful effort to prevent Bonilla from performing his shop steward's function and a determination to discharge him if he continued to engage in these activities. As discussed above, I reject Respondent's contention that its actions with respect to Bonilla were occasioned by his lack of productivity. Respondent violated Section 8(a)(1) and (3) of the Act by subjecting Bonilla to closer supervision. *Palagonia Bakery Co.*, 339 NLRB 515, 528 (2003).

C. Johnnie's Poultry Violations

Pursuant to the rule set forth in *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), enfd. denied 344 F.2d 617 (8th Cir. 1965), the Board has consistently required an employer to administer three warnings to each employee it interviews in preparation for an unfair labor practice proceeding. The employer must communicate to him of "the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis." There must be strict compliance with the requirements of *Johnnie's Poultry* and if the employer fails to give even one of the warnings to each employee interviewed a violation of Section 8(a)(1) will be found. *Standard-Coosa-Thatcher, Inc.*, 257 NLRB 304 (1981), enfd. 691 F.2d 1133, 1140-1141 (4th Cir. 1982).

Fred Sebade was told by both the foreman and Respondent's attorney that he would

have to testify because Bonilla was suing the company, but Sebade asserted that he was appearing voluntarily. Fred Sebade testified that he met with Respondent's attorney prior to the instant hearing. Sebade did not state that his meeting with the attorney was voluntary. Sebade testified that he was not assured that no reprisals would be taken against him as a result of anything he said. By failing to inform Fred Sebade that his meeting with the attorney was voluntary and that no reprisals would be taken against him Respondent violated Section 8(a)(1) of the Act.

Thomas Harty testified that he met with Respondent's attorney on two occasions at the foreman's direction; he was asked to go and he went. Harty testified that he was not assured that he would suffer no reprisals if he refused to meet with the attorney or if he refused to answer his questions. Harty testified that he was instructed to give his affidavit to Respondent's attorney but he did not state that any assurances were given to him in connection with handing over the affidavit. There is no evidence that he was told the purpose of his meetings with Respondent's counsel. I find that Respondent violated Section 8(a)(1) of the Act by failing to inform Harty of the purpose of the meetings, that his participation in the meetings with Respondent's counsel was voluntary and that he would suffer no reprisals as a result of the meetings. Further, Respondent violated Section 8(a)(1) of the Act by failing to give Harty assurances that no reprisals would ensue if he failed to turn over his affidavit or as a result of the contents of the affidavit. *Pioneer Concrete Co.*, 241 NLRB 264, 267 (1979).

Conclusions of Law

1. By subjecting Alberto Bonilla to closer supervision and by discharging Alberto Bonilla because he engaged in Union activities in support of New York City District Council of Carpenters, Respondent violated Section 8(a)(1) and (3) of the Act.

2. By Interviewing employees in preparation for an unfair labor practice proceeding without advising them of the purpose of the interview, without advising them that their participation was voluntary and giving them assurances that no reprisals would ensue, Respondent violated Section 8(a)(1) of the Act.

3. By asking an employee for a copy of his affidavit without advising him that no reprisals would ensue if he failed to turn over this affidavit or as a result of the contents of the affidavit, Respondent violated Section 8(a)(1) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged an employee, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Because the Respondent's work at the job site was nearly complete at the time of the hearing it appears that the employees on site during the time of the unfair labor practices would no longer be working at the location. Therefore, Respondent must duplicate and mail at its own expense a copy of the notice to all employees working at the site since the date of the first unfair

labor practice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷

5

ORDER

The Respondent, R & J Construction, 4435 Austin Boulevard, Island Park, New York, its officers, agents, successors, and assigns, shall

10

1. Cease and desist from

(a) Subjecting employees to closer supervision and discharging employees because they support New York City District Council of Carpenters or any other union.

15

(b) Interviewing employees in preparation for an unfair labor practice proceeding without advising them of the purpose of the interview, without advising them their participation is voluntary and giving them assurances that no reprisals will ensue.

20

(c) Asking employees for a copy of their affidavit without advising them that no reprisals will ensue for failure to turn over the affidavit or as a result of the contents of the affidavit.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

25

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Alberto Bonilla full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

30

(b) Make Alberto Bonilla whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

35

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

40

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

45

⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

50

(e) Within 14 days after service by the Region, post at its facility in Island Park, New York, copies of the attached notice marked "Appendix."⁸ Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Within 14 days after service by the Region, mail copies of the attached notice marked Appendix, at its own expense, to all employees in the carpenters unit who were employed by the Respondent at its 400 West 12th Street, New York City job site at any time from March 2009 until the completion of these employees' work at that jobsite. The notice shall be mailed to the last known address of each of the employees after being signed by the Respondent's authorized representative.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., September 7, 2010.

Eleanor MacDonald
Administrative Law Judge

⁸ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the New York City District Council of Carpenters or any other union.

WE WILL NOT subject you to closer supervision because you engage in Union activities.

WE WILL NOT interview any of you in preparation for unfair labor practice proceedings or request copies of your affidavits without advising you that your participation is voluntary and assuring you that no reprisals will be forthcoming.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Alberto Bonilla full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Alberto Bonilla whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Alberto Bonilla, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

R & J CONSTRUCTION

(Employer)

Dated _____

By _____

(Representative)

(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

26 Federal Plaza, Federal Building, Room 3614

New York, New York 10278-0104

Hours: 8:45 a.m. to 5:15 p.m.

212-264-0300.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 212-264-0346.